ARULAPPAN KANNAN A

v.

DR SURESH CHOPRA & ORS

HIGH COURT MALAYA, ALOR SETAR B
SOFIAN ABD RAZAK J
[CIVIL SUIT NO: 21-7-2003]
1 NOVEMBER 2010

TORT: *Negligence - Medical negligence - Duty and standard of care - Whether breached - Whether nature of disease explained to patient - Whether risks of surgery clearly explained - Consent form and parol evidence rule - Whether surgery worsened patient's condition - Whether defendant (general orthopaedic surgeon) qualified to carry out spinal decompression and discectomy - Whether patient informed that defendant was not a spinal surgeon* C D

EVIDENCE: *Documentary evidence - Agreed bundle - Dispute as to authenticity - Whether could be allowed - Whether medical record a contemporaneous document* E

This was a claim in medical negligence brought by the plaintiff against the defendants for the recurrence and/or worsening of his 'degenerative disc disease' ('condition') after he had sought treatment at the Alor Setar Hospital ('the hospital') and a 'spinal decompression and discectomy' ('the procedure') was performed F on him by the 1st defendant. The 2nd and 3rd defendants were, respectively, the director of the hospital and the Government of Malaysia. It was the plaintiff's case that, post-procedure, he experienced even more excruciating pain and was unable to walk unaided or sit for prolonged periods. The plaintiff also alleged that G it was never explained to him that: (i) he suffered from the condition; (ii) the procedure bore critical risks (paralysis); and (iii) the 1st defendant was not a 'spinal surgeon'.

Held (dismissing the claim): H

(1) Applying the test as enunciated in *Rogers v. Whither* and adopted in *Foo Fio Na v. Dr Soo Fook Mun & Anor* FC to the whole of the evidence, it would appear that the plaintiff has failed to prove his claim on a balance of probabilities. A high degree of probability (standard of proof) is required in cases I of medical negligence (*Whitehouse v. Jordan & Anor*). (paras 15-16, 20, 21-22, 40 & 44)

(2) It was clear from the evidence that the 1st defendant had explained to the plaintiff the nature of his condition as well as the material risks of the procedure, and that the plaintiff had understood and consented to the procedure with full knowledge of the risks involved. A medical officer (working under the 1st defendant) had also explained the said risks to the plaintiff during a grand ward round. Further, a house officer had also explained the nature and risks of the procedure to the plaintiff before he signed the consent form. The plaintiff was estopped from contradicting the consent form by virtue of ss. 91 & 92 Evidence Act 1950. (paras 23, 25, 28-29, 31-32, 36 & 41-43)

(3) There was no evidence that the plaintiff's conditioned worsened as a result of the procedure. In fact, there was evidence that his condition had improved after the procedure. The plaintiff's present condition was a relapse or 'degenerative disc disease at another level'. (paras 34-35)

(4) Although the plaintiff was not a 'spinal surgeon' but a 'general orthopaedic surgeon', he was, nevertheless, suitably qualified to carry out the procedure on the plaintiff. This was made known to the plaintiff. (para 37)

(5) The plaintiff was precluded from disputing the authenticity of the defendants' medical record (Part 2, common agreed bundle of documents). The record was a contemporaneous document. (paras 38-39)

[Defendants not negligent.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors. v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 ***(refd)***

Chin Keow v. Government of Malaysia & Anor [1967] 1 LNS 25 PC ***(refd)***

Elizabeth Choo v. Government of Malaysia & Anor [1960] 1 LNS 24 HC ***(refd)***

Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(dist)***

Hasan Datolah v. Kerajaan Malaysia [2010] 5 CLJ 764 CA ***(dist)***

Kow Nam Seng v. Nagamah & Ors [1981] 1 LNS 147 FC ***(refd)***

Liew Sin Kiong v. Dr. Sharon DM Paulraj [1996] 2 CLJ 995 HC ***(foll)***

Rogers v. Whither [1992] 175 CLR 479 ***(foll)***

Sidayway v. Board of Governors of Bethlem Royal Hospital [1985] AC 871 ***(refd)***
Swamy v. Matthews & Anor [1967] 1 LNS 174 FC ***(refd)***
Whitehouse v. Jordan & Anor [1980] 1 All ER 650 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92

For the plaintiff - V Rajadevan; M/s Rajadevan & Assocs
For the defendant - Donald Joseph Franklin SFC

Reported by Gan Peng Chiang

JUDGMENT

Sofian Abd Razak J:

[1] This was an action brought by the plaintiff against the first defendant and the second defendant respectively for damages for negligence. At the conclusion of the trial the plaintiff called two and the defendants called three witnesses respectively.

The Brief Facts According To The Plaintiff

[2] The plaintiff was at all material times a police personnel with the rank of Lance Corporal with Royal Malaysian Police. He was suffering from pain over his back and his spine as well as numbness over his right leg since 1996. He went to Hospital Alor Setar for treatment since 1996. He was diagnosed as suffering from 'Degenerative Disc Disease'. Since 13 November 1996, the first defendant had treated the plaintiff conservatively. However over time, condition worsened. On 20 June 2000, the plaintiff underwent 'Spinal Decompression and Disectomy' L1 L2 which was performed by the first defendant. The plaintiff now complains of recurrence of the symptoms and worsening of the condition.

[3] The Plaintiff's Case

a. The plaintiff's contention is that his condition had worsened after the 'Spinal Decompression and Disectomy L1 L2' operation was carried out on 20 June 2000.

b. The plaintiff alleges that he is unable to walk without the aid of a walking stick after the surgery, the pain had become more excruciating than prior to the surgery and that he is unable to sit for long periods of time.

c. The plaintiff also contends that he was not informed of the fact that he was suffering from 'Degenerative Disc Disease'.

d. The plaintiff further alleges that the first defendant never explained to him in respect of the risks of the operation, particularly that he may not be able to walk after the operation.

e. The plaintiff contends that the first defendant failed to disclose to him that the first defendant was not a 'spinal surgeon'. The plaintiff says that the surgery should have been performed by a 'spinal surgeon'.

[4] The Defendants' Case

a. The defendants contend that the first defendant did explain to the plaintiff that he was suffering from 'Degenerative Disc Disease'.

b. It is also contended that the approximately four years of conservative treatment given to the plaintiff had failed to yield the desired result and that the plaintiff's condition had worsened. As a result, surgery was warranted.

c. The defendants further state that the first defendant had informed and explained the risks and benefits of the 'Spinal Decompression and Disectomy L1 L2' to the plaintiff on many occasions.

d. The defendants contend that the plaintiff had agreed to undergo the operation out of his own free will as well as with the full knowledge and understanding of the risks involved and that his consent to the surgery was an informed one.

e. The defendants further contend that the plaintiff's condition had improved after the operation and the present condition of the plaintiff is due to recurrence of the symptoms prior to the surgery, a known risk of surgery and which was explained to the plaintiff prior to the surgery.

[5] The Relevant Issues Before The Court For Its Determination

a. whether the first defendant has explained the risks of the operation as well as the risk of paralysis to the plaintiff prior to the 'Spinal Decompression and Disectomy L1 L2'.

b. whether the plaintiff's condition had worsened after the surgery.

c. whether the first defendant has explained to the plaintiff that he was suffering from 'Degenerative Disc Disease'.

d. whether the first defendant has informed the plaintiff that he was not a 'Spinal Surgeon' prior to carrying out the operation.

[6] The Witnesses Called

Plaintiff's Witnesses

i) SP1 – Arulappan a/l Kannan – the plaintiff himself;

ii) SP2 – Dr Harwant Singh a/l Harcharan Singh Tara – the plaintiff's expert witness.

[7] Defendant's Witnesses

i) SD1 – Dato' Dr Suresh Chopra – the first defendant

ii) SD2 – Dr John Ooi Tzen Chong – former Medical Officer at Hospital Alor Setar

iii) SD3 – Dr Se To Boon Chong – the defendants' expert witness.

The Submission By The Plaintiff

[8] The evidence of the plaintiff is contained in his witness statement tendered to the court and marked as exh. P1. The plaintiff's averred that the risks involved in the surgery was never explained to him. He was merely asked to sign a form 'Keizinan Pembedahan' which was tendered as exh. P3 found at p. 106 of the bundle B. To substantiate that the risk was never explained to the plaintiff, learned counsel scrutinized the consent form exh. P3 and no reference to the risks involved in the surgery was stated in the form exh. P3. It merely states that 'Keadaan dan tujuannya telah di terangkan'. It shows that one Dr Usman explained the content of the form to the plaintiff. Learned counsel for the plaintiff averred that Dr Usman was not called to give evidence.

[9] In cross-examination of the plaintiff, it was put forward that SD1 who informed the plaintiff of the risks involved in the surgery although it was never pleaded so in the defence. Further it was also never put to the plaintiff that he was informed of the risks involved in the surgery by any other doctor. Learned counsel cited the case of *Aik Ming (M) Sdn. Bhd. & Ors. v. Chang Ching Chuen & Ors. & Another Case* [1995] 3 CLJ 639, where Gopal Sri Ram stated as follows:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal cases. It applies with equal force in the trial of civil cases as well.

[10] Ironically, it was submitted by learned counsel for the plaintiff that although Dr Usman was never called to testify but SD2 gave evidence that he had explained the risks inherent in the surgery to the plaintiff. The circumstance herein necessitated the court to view SD2's testimony with suspicion for the following reasons namely, his name was never pleaded in the defence, secondly it was never put to the plaintiff that SD2 had explained the risk inherent in the surgery to the plaintiff. Thirdly, SD2 relied on the document tendered and marked as exh. D8 found at p. 155 of bundle B to support his oral testimony. Exhibit D8 is part of the hospital's record which is collectively found at pp. 149 to 241 of bundle B. Learned counsel then alluded the court's attention to some of the pages for example at p. 150 of bundle B there is at the top the No: 4 circled and at p. 151 is the No: 8 has been clearly altered. There are alterations found at pp. 153 at No: 6, 155 the No: 9; 156 the No: 10. For these alterations no explanation was pre-offered except that SD1 merely said 'I was not the one who produced the record' and at p. 155 of exh. D8, the writing was by someone named 'Siti'. SD2 testified that he wrote the notes on p. 155. The learned counsel then submitted that the entry on D8 was an afterthought and therefore not a contemporaneous document as there has been alterations to pages with no explanation offered. The best person to have confirmed if D8 was a contemporaneous document would have been named in

the defence. In conclusion the learned counsel submitted that on a balance of probabilities it is clear that the plaintiff was not told of the risks involved in the surgery. SP2 when referred to exh. D8, that there was no initial by the patient (plaintiff) acknowledging that he had understood the risks of the operation and hence he could not conclude that the plaintiff understood the risks of the operation.

[11] It was further submitted that on the facts of this case, that the defendants have failed to inform the plaintiff of the inherent risks in the surgery which is a breach of duty and has caused the plaintiff to suffer extensive pain and suffering. The learned counsel for the plaintiff further referred the medical reports exh. P4 at p. 59 bundle B and also at p. 62 bundle B. As for general damages, the learned counsel has asked for the sum of RM200,000 as general damages.

[12] The Submission By The Defendants

i. On The Issue Of Whether The First Defendant Has Explained The Material Risks Of The Operation Particularly The Risk Of Paralysis To The Plaintiff Prior To The 'Spinal Decompression and Disectomy L1 L2'

a) The plaintiff contends that the first defendant did not explain the risks of the surgery to him and that had this been done, he would not have consented to the operation. It is the defendants' contention that the first defendant had explained all the material risks which involved in a 'Spinal Decompression' and Disectomy L1 L2 to the plaintiff prior to the latter consenting to the operation and that he had given consent to undergo the operation with the full knowledge of those material risks of the procedure.

b) The defendants submit that the fact the plaintiff consented to the operation is without doubt. This is evidenced by exh. P3 which is the 'Borang Keizinan Pembedahan' (at p. 106 of bundle B). In consent form, the plaintiff had agreed to undergo 'Spinal Decompression and Disectomy L1 L2' of which the nature and purpose had been explained to him by one Dr Usman who was the house officer of the operating team at the material time.

c) In addition, the said Dr Usman had also confirmed in exh. P3, that he had explained the nature as well as the purpose of the surgery to the plaintiff.

d) Nonetheless, it must be pointed out that, during cross-examination, he agreed with the SFC that if he was not agreeable to the operation, the first defendant could not have forced him to undergo the operation.

e) The defendants respectfully submit the SP1 is by virtue of the ss. 91 and 92 of the Evidence Act 1950, stopped from denying the contents of the consent form which he had signed.

f) In relation to the explanation of the risks of the operation, SD1 who was an orthopaedic specialist at the Department of Orthopaedics and Traumatology, Hospital Alor Setar at the material time, and had in evidence explained to the plaintiff that the surgery has the following risks namely:

i) that some spinal nerves might be injured during the surgery and this could result weakness in the leg, with or without consequent paralysis, nerve problems and bowel and/or bladder complications;

ii) that there is a risk of infection and if this happens, then he may require further treatment including surgery and antibiotics and;

iii) that there is a risk of relapse of the symptoms even after a successful surgery and that this could occur due to further problems at the site of surgery or he could develop disc problem at another level giving rise to pain and/or numbness.

g) SD1 had also explained to the plaintiff the consequences of not going for the surgery in simple layman's language in Bahasa Malaysia and in the manner that the plaintiff would be able to understand. It was explained to the plaintiff that if surgery was not performed, there was a risk that the disc might go forward and further press on the spinal cord causing nerve problems in his leg which in turn would lead to weakness in the leg. The plaintiff might also suffer from

incontinence of bowel and/or bladder problems, which means that he would not be able to control passing urine and faeces. SD1 had also explained that there was a small risk of being paralysed if the plaintiff did not undergo the surgery but that at the same time the surgery itself carried some risks of paralysis.

h) SD1 stated that the plaintiff understood all this and opted for surgery because of the severe pain he had. This was clearly confirmed by the plaintiff during cross-examination where he eventually agreed to undergo the operation because his condition had not improved and he wanted the pain to reduce and that he underwent the operation because he could not endure the pain which he had been having over the years.

i) SD1 further state that he explained to the plaintiff the risks of the operation in the manner which the plaintiff could understand and that the plaintiff had agreed to undergo the operation after understanding the risks that he explained for at least an hour.

j) SD1 testified that he did not in any way influence the decision of the plaintiff to opt for operation and that the plaintiff agreed to undergo the operation out of his free will with the full knowledge of the condition he was suffering from, the consequences of not going for the surgery as well as its risks.

k) Furthermore, SD1 testified that on 19 June 2000, ie, one day before the surgery, that he saw the plaintiff when he led a group of medical personnel on a Grand Ward Round where the team would attend to each and every patient in the ward, assess their condition, speak to them about their illnesses and explain the necessary to the patients. In particular, SD1 testified that during this Grand Ward Round, he had explained to the plaintiff the risks of surgery in layman's language, in the Malay language. This explanation was documented by a medical officer by the name of John Ooi.

A l) This evidence of SD1 that he had explained the risks of the operation to the plaintiff is strongly corroborated and supported by the evidence of SD2. The defendants submit that SD2's evidence fortifies the evidence of SD1 as well as the case for the defendants that the plaintiff was
B informed of all the material risks of the surgery before he underwent the procedure on 20 June 2000. SD2 was then, at the material time a medical officer at the Hospital Alor Setar. He was part of the team led by SD1 doing the Grand Ward Round on 19 June 2000 the day before the
C surgery.

m) The documentation in relation to the risks of the operation explained by SD1 and SD2 is a contemporaneous recording of the explanation made to the plaintiff in exh.
D D8. SD2 confirmed this during cross and re-examination and reiterated that he documented the explanation immediately after such explanation of the risks was given to the plaintiff.

E n) It is further submitted that the medical record are contemporaneous record of the medical management of a patient. Such records are intended for the benefit of other medical personnel and therefore it is not a practice and neither is there any requirement under any law or
F regulation for patients to put their signature/initials in the records.

o) In cross-examination, SD3 had admitted that in the Borang Keizinan Pembedahan (exh. P3) the risks of the surgery were not stated in the consent form. Nevertheless,
G in re-examination, SD3 confirmed that despite the risks of surgery in exh. P3, the risks of the surgery was explained to the plaintiff as evidenced by exh. D8.

p) Finally on this issue, the defendants submit that on the
H balance of probabilities, had established that at all the material time the risks of the procedure – 'Spinal Decompression and Disectomy L1 L2' were clearly explained to the plaintiff before he consented to the surgery.

I

ii) Whether The Plaintiff's Condition Has Worsened After The Surgery

a) The plaintiff contends that his condition had become worse after the 'Spinal Decompression and Disectomy L1 L2'.

b) The defendants contend otherwise. The defendants submit that the plaintiff has not adduced any evidence to support his contention that his condition had worsen after surgery. In fact from the evidence of the defendants through SD1 it was shown that the condition of the plaintiff had not improved but had deteriorated over the period of four years from 1996-2000 and conservative treatment did not improve his condition. Therefore he offered the plaintiff the option of undergoing a 'Spinal Decompression and Disectomy L1 L2' in view of the neurological deficits had set in. This is supported by the opinion of Prof Dr Abdul Razak from whom SD1 had sought a second opinion that surgical decompression will benefit the plaintiff if the symptoms are progressing and conservative treatment does not yield the desired result. It was further confirmed by SD3, the defendant's expert witness who agreed that the plaintiff's condition had progressively worsened and this was an indication for operation which he then referred to the medical records in bundle B from pp. 50 to 52 of the notes of evidence.

c) SD3, the defendants' expert witness was of the opinion that based on the sequence of events above, the plaintiff's condition had progressively worsened. He agreed that this was an indication for surgical intervention. He was also of the view that if no surgery was performed on the plaintiff, he may develop weakness in both limbs, paralysis of both the lower limbs and be unable to pass motion or urine. He further gave his opinion that if the plaintiff's condition worsened, any surgery at that point may not alleviate the symptoms.

d) SP2, the plaintiff's expert witness also supported the course of action taken by SD1 when he testified that on the basis that the plaintiff's condition had progressively worsened over the years since 13 November 1996, it was appropriate to offer surgery to relieve his condition. The defendants submit that there was no evidence to show that his condition has worsened post operation. SP2 his expert witness had not confirmed in his evidence that the plaintiff's condition had indeed worsened.

e) The defendants on the other hand had put forth evidence through SD1, that the plaintiff's condition had improved soon after the surgery even though he was still complaining of pain. He was able to stand and walk after surgery. Before he was discharged it was documented that he was comfortable; he had no lower limb pain and had backache only once in a while and he could stand and walk with support. A few months after surgery the plaintiff presented himself for follow-up at the clinic and stated that he had no backache and was able to walk and has declined medication.

f) The defendants submit that the plaintiff's condition had indeed improved after surgery and that what he is now suffering would probably be a degenerative disc disease at another level and/or relapse of the symptoms which is one of the risks that were made known to the plaintiff before he underwent the operation. It is also the defendants' submission that the plaintiff had failed to discharge the burden on him to prove his allegation that his condition had worsened after the surgery. He had failed to adduce any medical evidence to substantiate his claim of worsening of the symptoms after the operation.

iii) Whether The First Defendant Has Explained To The Plaintiff That He Was Suffering From 'Degenerative Disc Disease'

a) SD1 did explain to the plaintiff that he was suffering from Degenerative Disc Disease in layman's term using spine model to illustrate the condition. His explanation was in Bahasa Malaysia and the plaintiff understood. Moreover SD1 said that he was involved in the management and treatment of the plaintiff for many years since 13 November 1996 and that during this period, he had explained to the plaintiff, on numerous occasions, the condition that he was suffering from.

b) Accordingly SD1's evidence in relation to the explanation was never challenged in cross-examination.

c) The defendants averred that when asked why would he want to undergo the operation without knowing the illness he was suffering from and the risks of the operation which might be suffered lifelong should it be unsuccessful, the plaintiff stated that he had full faith in SD1. The defendants submit that it is unthinkable that the plaintiff would blindly have full faith in

SD1 without knowing the nature of his condition of Degenerative Disc an illness which had been affecting him in his daily activities for quite some time. Besides that there was also a letter issued by Prof Dr Abdul Razak to the plaintiff's employers stating that he is suffering from Degenerative Disc Disease and recommending that plaintiff be given light duties.

d) Therefore, it is submitted that from the evidence given, on the balance of probability, SD1 did explain to the plaintiff that he was suffering from Degenerative Disc Disease.

iv) Whether The First Defendant Has Informed The Plaintiff That He Was Not A 'Spinal Surgeon' Prior To Carrying Out The Operation

a) The plaintiff contends that the first defendant had not informed him that he was not a spinal surgeon.

b) The defendants on the other hand submit that the first defendant had informed the plaintiff that he was not a Spinal Surgeon prior to carrying out the operation. The defendants further submit that as an orthopaedic surgeon, SD1 is suitably qualified to carry out the 'Spinal Decompression Disectomy' surgery.

c) SD1 said the plaintiff was fully aware that SD1 was not a 'spinal surgeon' as he had on numerous occasions told the plaintiff that he was a general orthopaedic surgeon but that he does spinal surgery. He had also said that this was one of the reasons why he referred the plaintiff to Prof Dr Abdul Razak for a second opinion who was an orthopaedic surgeon experience in spine surgeries.

d) It is also the submission of the defendants, that SD1 being a general orthopaedic surgeon, is suitably qualified to perform 'Spinal Decompression and Disectomy L1 L2'. This has been clearly explained by SD1 where he said that he is an orthopaedic surgeon who performs spinal surgeries. He further stated that 'Spinal Decompression and Disectomy is one of the core procedures that orthopaedic surgeons do.

e) SD1 has also testified and clarified that the Ministry of Health in Malaysia does not gazette Orthopaedic surgeons as spine or arthroplasty surgeons but they are gazetted only as Orthopaedic surgeons. Even the National Credentialing Board

of which SD1 is a member credentials only Orthopaedic surgeons and not specialists. At the material time there is no spinal surgeons with expertise in spine surgeries.

f) It is also submitted that the plaintiff had not adduced any evidence to show that SD1 was not suitably qualified to perform the operation. Neither was SD1 evidence challenged in cross-examination as to his qualification to perform the operation the operation. Neither was SD1's evidence challenged in cross-examination as to his qualification to perform the operation.

The Finding Of The Court

[13] The plaintiff was diagnosed as suffering from 'Degenerative Disc Disease'. On 20 June 2000, the plaintiff underwent 'Spinal Decompression and Discectomy L1 L2 which was performed by the first defendant. He now complains of recurrence of the symptoms and worsening of his condition and could not walk without the aid of a walking stick. He alleged that the first defendant was negligent. In what way was the first defendant said to have been negligent?

[14] The statement of claim alleged that the first defendant was negligence in four aspects namely:

i) that the first defendant has not explained the risks of the operation as well as the risks of paralysis to the plaintiff prior to the 'Spinal Decompression and Discectomy L1 L2'.

ii) that the plaintiff's condition had worsened after surgery.

iii) that the first defendant has not explained to the plaintiff that he was suffering from 'Degenerative Disc Disease' and

iv) that the first defendant has not informed the plaintiff that he was not a 'Spinal Surgeon' prior to carrying out the operation.

[15] On the totality of evidence before me and applying the test adopted in *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229 in adopting the test in the Australian case of *Rogers v. Whither* [1992] 175 CLR 479 (hereinafter called the *'Rogers v. Whither test'*), I ruled that the plaintiff has failed to prove his claim against the defendants on all the allegations on the balance of probabilities and dismissed the claim with costs. The plaintiff has challenged that finding.

The Standard Of Proof

[16] The standard of proof which the law imposed on the plaintiff was that required in civil cases, namely proof on the balance of probabilities. In *Whitehouse v. Jordan & Anor* [1980] 1 All ER 650 it was said that:

> Allegations of negligence against medical practitioners should be considered serious and the standard of proof is, therefore a high degree of probability

The Standard Of Care

[17] The *locus classicus* for the standard of care expected of medical practitioners is the case of *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118 (hereinafter called the 'Bolam test') and at p. 121 the *Bolam* test was enunciated by McNair J as follows:

> ... where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of a man on the top of a Clapham omnibus, because he has not got this skill. The test is the standard of the ordinary skilled man exercising and professing to have that skill.

His lordship further at p. 122 pointed out that:

> ... A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that medical act ... Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes the contrary view.

[18] The *Bolam*'s test was not followed by the High Court of Australia in *Rogers v. Whitaker (supra)*. In that case a patient brought an action for negligence against an ophthalmic surgeon who performed an elective surgery to her right eye. Although there was a remote risk that the operation could affect her good eye but she was not so informed. Coincidentally, that risk eventuated which caused her to be blind in both eyes. She brought an action against the appellant alleging, among others, that the appellant was negligent in failing to warn her of the risk of the operation. In determining the standard of care of the surgeon, the court

A adopted with approval the test laid down by Lord Scarman, the dissenting judge in *Sidayway v. Board of Governors of Bethlem Royal Hospital* [1985] AC 871 to the effect that whether a doctor has breached his duty of care towards his patient is to be determined not exclusively by reference to the current state of responsible
B and competent professional opinion and practice at the time of the matter in question.

[19] In Malaysia, the *Bolam* principle has been applied extensively by the courts in medical negligence cases when determining the
C standard of care such as:

i) *Swamy v. Matthews & Anor* [1967] 1 LNS 174;

ii) *Chin Keow v. Government of Malaysia & Anor* [1967] 1 LNS 25;

D

iii) *Elizabeth Choo v. Government of Malaysia & Anor* [1960] 1 LNS 24 HC

iv) *Kow Nam Seng v. Nagamah & Ors* [1981] 1 LNS 147.

E **[20]** The *Bolam*'s test nevertheless was not adopted by the Federal Court in *Foo Fio Na v. Dr. Soo Fook Mun & Anor (supra)* in preference to the test adopted in *Rogers v. Whitaker (supra)* where the court held that the standard of care is not determined solely or even primarily by reference to the practice followed or
F supported by a responsible body of medical opinion. It is now a question which is for the ultimate consideration of the courts and no longer one for the medical profession to decide through a responsible body of medical opinion.

G **[21]** The *Rogers v. Whither* test was further clarified in *Rosenberg v. Percival*, 178 ALR 577 by Gleeson CJ in the following words at p. 579:

> ... *Rogers v. Whitaker*, makes clear, the relevance of professional practice and the opinion was not denied; what was denied was its
H conclusiveness. In many cases, professional practice and opinion will be primary, and in some cases it may be the only, basis upon which a court may reasonably act. But, in an action brought by a patient, the responsibility of deciding the doctor's duty of care rests with the court, not his or her own professional colleagues'.

I

[22] The brief facts of *Foo Fio Na v. Dr Soo Fook Mun & Anor (supra)* concerned a patient who underwent a surgical operation for dislocation of the fifth and sixth cervical vertebrae. He became paralysed the day after the operation. It was established that the paralysis was due to the pressure on the spinal cord caused by the wire loop placed to correct the dislocation. He sued the orthopedic surgeon who performed the operation for negligence. The learned trial judge found for the appellant but the Court of Appeal reversed the decision. On appeal to the Federal Court, the question of law posed before the court was 'whether the *Bolam* test' should apply in relation to all aspects of medical negligence. The court answered the question in the negative. Speaking for the court, Siti Norma Yaakob FCJ (later CJM) after referring to a number of earlier cases on this issue (including *Rogers v. Whitaker (supra)*) had this to say:

> ... there is a need for members of the medical profession to stand up to the wrong doings, if any, as is the case of professionals in other professions. In so doing people involved in medical negligence cases would be able to obtain better professional advice and that the court would be appraised with evidence that would assist them in the deliberations. On this basis we are of the view that the *Rogers v. Whitaker* test would be more appropriate and viable test of this millennium than the Bolam test.

The Federal Court further held at p. 246 para. 39 that:

> That said, we are of the opinion that the Bolam's test has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment. The practitioner is duty bound by law to inform his patient who is capable of understanding and appreciating such information of the risks involved in any proposed treatment as to enable the patient to make an election of whether to proceed with the proposed treatment with the knowledge of the risks involved or decline to be subjected to such treatment.

[23] Reverting to the facts and the four allegations of incidences of negligence as a result of the breach of duty of care to the plaintiff, the court will deal with them in sequence.

i) On the 1st aspect of negligence, the court was of the view that there were ample evidence to show that the first defendant had explained the material risks which are involved

in a 'Spinal Decompression and Discectomy L1 L2 to the plaintiff prior to the giving of consent by the plaintiff with full knowledge thereof. This is evidenced by exh. P3 which is the 'Borang Keizinan Pembedahan'. In the said consent form, the plaintiff had agreed to undergo the surgery of which before signing it was explained by one Dr Usman who was the house officer of the operating team at the material time. In fact in exh. P3 Dr Usman had explained the nature as well as the purpose of the surgery to the plaintiff. The fact Dr Usman was not called as defendant's witness to corroborate the content of P3 does not in anyway prejudice the defendants' case. There were corroborative evidence by SD1 and SD2 to show that an explanation as to the risks, the purpose and the nature of the surgery was given to the plaintiff. In any event the plaintiff had agreed during the cross-examination that if he had not agreed and consented thereto, the first defendant could not have forced him to undergo surgery.

[24] By virtue of ss. 91 and 92 of the Evidence Act 1950 the plaintiff is estopped from denying the consent form which he had signed. It is not disputed that the plaintiff had formally consented to surgery although the law makes it abundantly clear that the defendants are duty bound to inform the plaintiff in the clearest language capable of been understood of the risks involved in the proposed surgery so as to enable the plaintiff to make an election whether to proceed with the proposed treatment with full knowledge of the risks involved or decline to be subjected to such treatment. It is in evidence that the SD1 had explained to the plaintiff the risks of surgery in simple layman's Bahasa Malaysia language capable of been understood.

[25] The risks that were explained to the plaintiff by SD1 can be found in the evidence as found in exh. P6 in answer to Question 26 where he stated as follows:

i) that some spinal nerves might be injured during surgery and this could result weakness in the leg, with or without consequent paralysis, nerve problems and bowel/or bladder complications

ii) that there is a risk of infection and if this happens, then he may require further treatment including surgery and antibiotics and;

iii) that there is a risk of relapse of the symptoms even after a successful surgery and that this could occur to further problems at the site of surgery or he could develop disc problem at another level giving rise to pain and/or numbness.

[26] During cross-examination of the plaintiff, he was asked the following question at p. 8 of notes of evidence para. B namely:

Q: Tidakkah kamu ingin tahu kenapa kamu mengalami kesakitan?

J: Memang ada keinginan untuk tanya tapi tidak tanya.

[27] At p. 9 para. B of the notes of evidence which states as follows:

PUT:Bahawa pada masa itu sebab kamu risau sangat dengan sakit kamu, kamu ada tanya Dr Suresh kenapa kamu sakit sangat.

J : Pada masa itu saya tidak tanya.

[28] If the plaintiff had seen SD1 and had not taken the trouble to ask SD1 what's wrong with him with regard to the pain, then it was the plaintiff's fault in not asking SD1 when there was an opportunity to do so. In *Sidaway v. Bethlem Royal Hospital Government & Ors (supra)* the court held that a patient cannot complain of lack of information unless the patient asked in vain more information or unless there exist special danger which has to be disclosed to the patient to enable him to make his decision whether to submit to the operation or otherwise. In the instant case, the evidence shows that the plaintiff himself did not asked any question with regard to the pain he is suffering but there is evidence to show that SD1 had explained to the plaintiff about the surgery. This can be seen from the notes of evidence at p. 9 para. C where the plaintiff stated as follows namely:

Saya ada jumpa dengan Dr Razak tapi tidak ingat tarikh. Berapa kali jumpa Dr Razak saya tidak ingat. Saya pergi jumpa Dr Razak selepas saya diberitahu akan di operate oleh Dr Suresh (emphasis added)

[29] The above evidence shows that the plaintiff knew that he was going to be operated on by the SD1 as early as 1996 (see notes of evidence at p. 9 para B). In other words the plaintiff have been enduring the pain way back in 1997 and the operation

was only performed on 20 June 2000 after almost three years later. It is incredulous for the court to think that during the appointment with Prof Dr Abdul Razak for a second opinion that the plaintiff is ignorant and oblivious and not put on his 'thinking cap' and be inquisitive about his state of health. The plaintiff is at material time a lower rank police personnel who was training to analyse and be inquisitive in the nature as a policeman. Something is amiss here which does not seem to 'click'.

[30] In fact SD1 had fixed a date for the plaintiff's operation on 19 May 1997 but on 7 May 1997 the plaintiff came and changed the date because his condition had improved. SD1 decided to obtain a second opinion regarding the need for the plaintiff to undergo surgery from Prof Dr Abdul Razak. In Prof Dr Abdul Razak views the surgery would benefit the plaintiff as the plaintiff had shown symptoms which were progressive and did not improve with conservative treatment. On 2 April 2000, the plaintiff's condition had deteriorated in that his pain had worsened, the claudication distance had reduced due to pain and had numbness in the lower limbs, neurological deficits had set in. SD1 then offered surgical intervention on the basis that the conservative treatment had not cured the plaintiff. Surgery was scheduled on 16 May 2000 but it was rescheduled to 20 June 2000. In view of the excruciating pain suffered by the plaintiff, the surgery was performed two days earlier.

[31] The evidence of SD2 who at the material time the medical officer in the Orthopaedic Department at the Hospital Alor Setar and working under SD1 confirmed that during the Grand Ward Round (hereinafter called the 'GWR') that on 19 June 2000 at 10am in the morning, he did a GWR comprised of other specialists, medical officer, nurses and medical assistants. One of the many patients whom he saw was the plaintiff who was scheduled for surgery called the 'Spinal Decompression and Disectomy L1 L2' the next day. The plaintiff was seen by SD1 who explained regarding the surgery and the risks. SD2 further stated that after the GWR he came back to the ward to re-explain the risks to the plaintiff and documented it in the notes. When SD2 came back to re-explain the risks he was alone. The witness also confirmed the at p. 155 bundle B exh. D8 that he had explained to the patient regarding operation and the risk of infection, injury to spinal cord/nerves with resultant motor/sensory

deficit lower limb and bladder and bowel control complications and relapse of symptoms even after successful surgery. It is inconceivable that the plaintiff would have consented to the surgery if the risks had not been explained to him.

[32] The court agrees with submission of the learned Senior Federal counsel (hereinafter called the 'learned SFC') that exh. D8 is a contemporaneous recording of the explanation made to the plaintiff. The court also finds that there is no provision in law or as a matter of practice that the plaintiff as a patient has a right or is required to put his signature or initials on exh. D8. Although the notes does not expressly state that the risks were explained to the plaintiff, an inference could be drawn from the totality of the evidence that the risks of the operation was indeed explained to the plaintiff.

2) On the 2nd aspect of negligence, whether the plaintiff's condition has worsened after the surgery.

[33] It is quite obvious that from perusing the medical records (exh. D8) the plaintiff's condition prior to surgery were not good and satisfactory as can be seen from the notes of evidence at pp. 50 to 52 para, C which is reproduced for easier reference namely:

> Page 64 – 27.1.1997 – 3 months history of pain, not able to work, severe backache on sitting, standing for a long time, numbness still persistent;
>
> Page 66 – 20.4.1997 – pain persistent getting worse, numbness increased, keen for surgery, backache present;
>
> Page 67 – 28.9.1997 – backache, severe pain, especially in moving, radiate to both limbs, abnormal gait present like robot;
>
> Page 70 – 30.11.1997 – pain not improved by conservative treatment; page 71 - MRI result showed acute moderate posterior prolapsed disc L1 L2 with associated osteophytes, posterior bulging disc L4 L5;
>
> Page 73 – 7.5.1998 – right lower limb pain after standing 2 to 3 minutes;
>
> Page 74 – 5.7.1998 – condition become worse, sit approximately 2 to 3 minutes pain, stand approximately 5 minutes pain, neuro claudication present worse on climbing stairs and driving;

Page 75 – 6.9.1998 – still complain of pain and radiating to the right leg;

Page 78 – 5.9.1998 – still having pain at lumbar area (para – spinal) only can stand about 2 minutes then develops pain;

Page 79 – 2.4.2000 complain of lumbar pain worsening past 2 weeks, radiating to both lower limbs, worst on the right leg (claudication distance half to 500 meters) and

Page 81 – complain of backache, able to stand only 2 minutes before pain develop, able to walk around in distance but with pain reduced by rest and lying position with hanging foot or leg.

[34] In reference to the above medical record of the plaintiff, SD3 was of the view that any surgery at that point may not alleviate the symptoms. There has been no evidence adduced by the plaintiff that his condition after surgery had worsened. SP2's evidence did not confirm that the plaintiff's condition had indeed worsened.

[35] The court however was able to observe the demeanour of the plaintiff when present in court and that the plaintiff had shown sign of pain and not able to sit comfortably for long while giving evidence. In addition the MRI shows that the plaintiff has now developed a broad based right paracental protrusion of the disc at L4 - L5 indenting the anterior theca as well as impinging on the right L5 nerve root. This means that the plaintiff has now developed degenerative disc disease at another level. The defendants' evidence also indicated that the plaintiff could stand and walk with support and a few months after surgery that is on 7 January 2001, the plaintiff presented himself for follow-up at the clinic and stated that he had no backache and was able to walk and declined medication. The court on the totality of the evidence is of the view that surgery has improved the plaintiff's conditions and what the plaintiff is now experiencing is a degenerative disc symptoms which is one of the risks that were made known to the plaintiff before he underwent surgery.

[36] On the 3rd aspect of negligence, the plaintiff said the he was not informed that he was suffering from 'Degenerative Disc Disease'. In evaluating the evidence on this issue it is a decision which has to be made between the plaintiff and the defendants' version. Invariably at the end of the day whose evidence is to be

believed. A simple straight forward evidence of the plaintiff is that there was no explanation by the SD1 to him. From the evidence as presented to court thus far shows that SD1 who was involved in the management and treatment of the plaintiff for many years since 13 November 1996 had explained to the plaintiff on numerous occasions the condition that he was suffering from. In fact the plaintiff did ask SD1 many questions regarding the Degenerative Disc Disease he was suffering. On this basis the court finds that SD1 did explain to the plaintiff regarding the Degenerative Disc Disease during the years from 1996 until before surgery was done on 20 June 2000.

[37] On 4th aspect of negligence, in that SD1 was not a spinal Surgeon and this fact was not made known to the plaintiff. The first defendant submitted that he had told the plaintiff that he is not a spinal surgeon. SD1 is an orthopaedic surgeon who he claims to be suitably qualified to carry out the 'Spinal Decompression and Discectomy L1 L2' surgery and had previously delivered lectures on spine. This can be seen by looking at SD1's CV which is marked as exh. D7. The court on this issue ruled that based on the evidence, is satisfied that SD1 is suitably qualified to carry out the surgery on the plaintiff. No evidence is adduced to challenge the qualification and experience of SD1 on this issue bearing in mind that at the material time there was no spinal surgeon in Malaysia yet!

[38] In evaluating the evidence in totality, the court finds that the crux of the plaintiff's case on all the four incidences of alleged negligence for breach of duty is essentially to challenge the authenticity, reliability and the correctness of the defendants' exh. D8. According to the learned counsel for the plaintiff there are alterations and the paginations seems to be included to justify the defendants' case. As for the learned SFC, the medical records of the plaintiff (exh. D8) are in bundle B which is the common agreed bundle of documents in Part 2 where the authenticity of the documents are agreed and not disputed. What is disputed is merely the contents and not the authenticity of the medical records (exh. D8) of bundle B.

[39] On this issue, the court agrees with the view of the learned SFC that once the said medical records (exh. D8) is included in Part 2 of the agreed bundle of documents, the plaintiff cannot dispute the authenticity of the documents but only as to the

contents therein. However if the learned counsel's view is that the plaintiff is disputing the contents of exh. D8, then the court is of the view that exh. D8 is a contemporaneous document on the ground that it is a documentation made to record what had been done by SD1 and SD2 respectively in respect of the medical management of the plaintiff. SD2 is the marker of exh. D8 and there is no necessity to call 'Siti' who was alleged to have written the notes in exhibit D8.

The Law In Relation To The Facts Of The Case

[40] Incidentally, as this judgment is written the issue of the standard of care has been revisited by the Court of Appeal in the recent case of *Hasan Datolah v. Kerajaan Malaysia* [2010] 5 CLJ 764 where on the facts the court agrees that Foo Fio Nia had without doubt rejected the *Bolam*'s test in so far as it relates to the determination of the standard of care to be observed by a medical practitioner in a medical negligence suits. The right or responsibility to make such a determination now rests with the court upon evaluation of the evidence before it, including the opinion and practices of members of that profession. The facts of the instant case and that of *Hasan Datolah*'s *(supra)* are easily distinguishable so are the facts of *Foo Fio Na (supra)*.

[41] In *Liew Sin Kiong v. Dr. Sharon DM Paulraj* [1996] 2 CLJ 995 where the facts are almost similar to the facts of the instant case. The brief facts are that the plaintiff alleged that the defendant failed to explain the possible complications and risks of blindness associated with the operation so that the plaintiff could have made an informed consent. The learned judge ruled that based on the evidence adduced by both parties, the risk of infection and blindness associated with the operation were explained to the plaintiff.

[42] The court agrees with the observations made by the learned judge in that the consent form is only a document to signify the plaintiff's consent to the operation. The document is not intended to spell out in detail whatever explanation which the defendant had given to the plaintiff regarding the operation's risk. Therefore the fact that it is not stated in the consent form that the risk of surgery was explained does not mean that it was not explained. It is abundantly clear that the evidence of SD1 and SD2 coupled with documentary evidence of exh. D8 conclusively proves that the material risks of the surgery was explained to the plaintiff.

[43] In any event even if SD1 and SD2 were in breach of their duty of care to inform the plaintiff of the risks of the surgery, the next issue for determination is whether the plaintiff's worsening condition post surgery was due to the SD1 and SD2 breach of duty of care in not disclosing the risks involved.

[44] The court on the totality of the evidence and after evaluating it finds that the defendants were not negligent and also not in breach of their duty of care to inform the plaintiff of the risk of surgery. The upshot is that the court finds the plaintiff on the balance of probability has failed to prove its claim against the defendants and hereby dismissed the claim with costs.